No. 86-914

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

**TIMOTHY S. MIHALCIK,**

*Petitioner,*

vs.

**ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,**

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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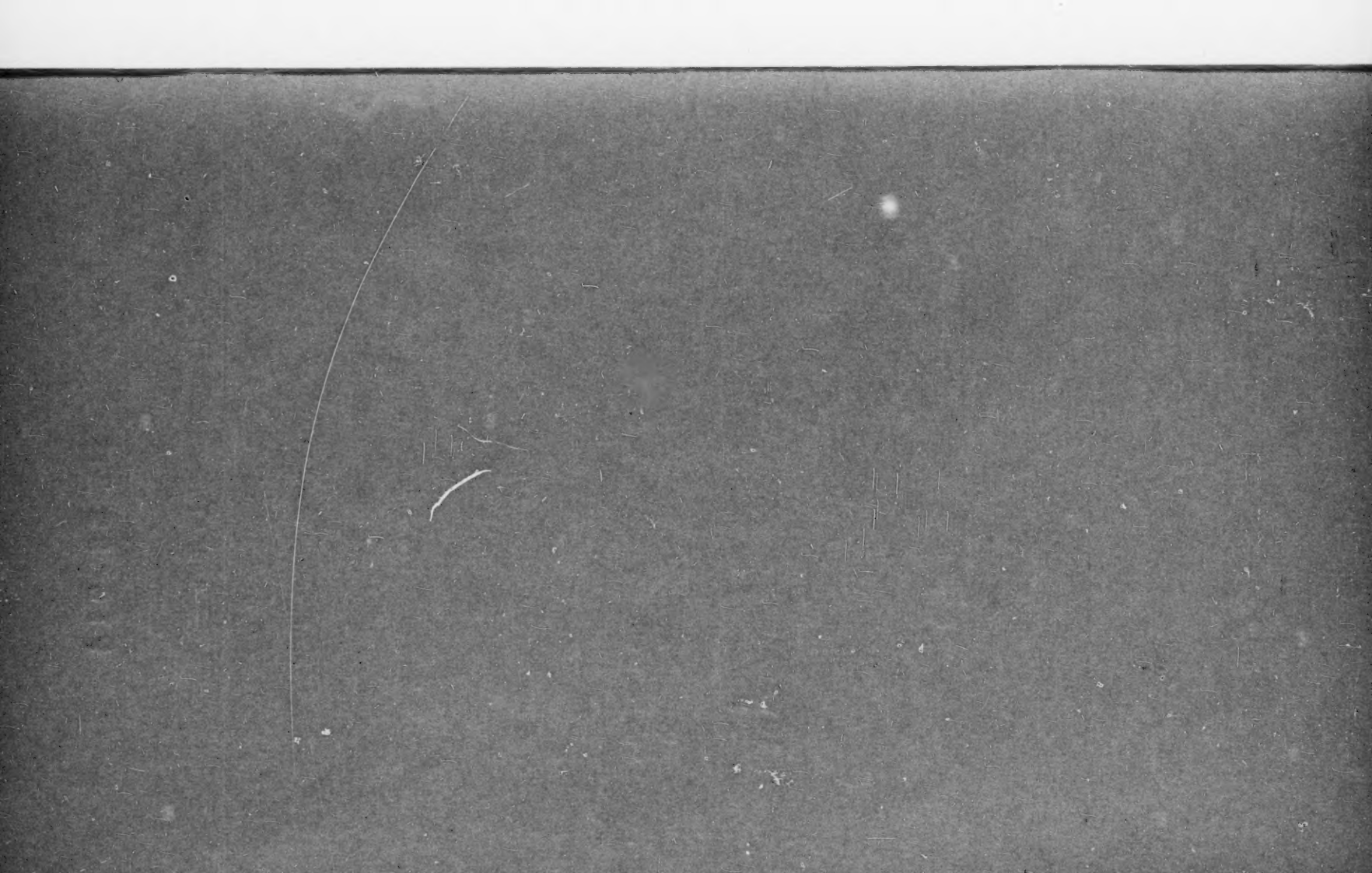

## QUESTIONS PRESENTED

There are no questions of sufficient significance to require the granting of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

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## OPINIONS BELOW

The opinions below are adequately described in the Petition, except that the Seventh Circuit opinion has been reported at 801 F.2d 949.

## STATEMENT

The statement of facts in the Petition is full of loaded descriptions designed to create a misleading impression

of the facts of this case. Respondent, however, will limit itself to correcting only important procedural facts.

The Respondent insurance company filed a federal statutory interpleader action in the district court against its insured, Rapco Foam, Inc. and Rapperswill Corporation, and against the various individuals who filed actions for damages for personal injuries and property damage against the Respondent's insureds.

Respondent issued a certain policy of insurance to its insureds which provided coverage in the amount of $250,000.00 excess of a $50,000.00 per claim self-insured retention for the period of November 4, 1976 to December 4, 1977. The insureds have been adjudicated bankrupt in separate proceedings in the United States Bankruptcy Court for the District of South Carolina. Respondent deposited the balance of the aggregate policy limits, $73,750.000, into the Registry of the district court.

Timothy S. Mihalcik, the Petitioner herein, is an interpleader defendant. Petitioner is also a party plaintiff in an action pending against the Respondent's insured Rapperswill Corporation in the Court of Common Pleas, Lorain County, Elyria, Ohio. On June 8, 1983, Petitioner and his family members recovered default judgments against the Respondent's insured in the Ohio proceedings in the amount of $175,000.00. Respondent's judgment is in the amount of $50,000.00.

On July 12, 1983, Petitioner and his family members filed a Supplemental Complaint against Respondent and other insurers of Rapperswill Corporation added as "new party defendants", in which action Petitioner sought to collect the judgments entered against the insurance company defendants' insured. On August 24, 1984, Petitioner obtained a default judgment against Respondent in the

Ohio proceedings in the amount of $21,071.42. The aggregate judgments for Petitioner and his family members total $73,750.00.

Petitioner, through counsel, notified Respondent of the outstanding judgments by letter dated August 16, 1985. Respondent thereafter moved in its federal statutory interpleader action to enjoin Petitioner from attempting to collect those judgments against Respondent except in the federal statutory interpleader action.

The District Court enjoined Petitioner by its Memorandum Opinion and Order dated November 25, 1985. Petitioner appealed that ruling, and the Court of Appeals affirmed. 801 F.2d 949 (7th Cir. 1986).

## ARGUMENT

### I.

### THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS NOT INCONSISTENT WITH ANY DECISION OF THIS COURT AND THE PETITION RAISES NO QUESTION WORTHY OF THE GRANTING OF A WRIT OF CERTIORARI TO THE COURT OF APPEALS AS DEFINED BY THIS COURT'S RULE 17.

Respondent cannot discern which consideration governing review on certiorari, as set forth in Rule 17 of the Rules of the Supreme Court, petitioner claims is applicable to the decision of the Seventh Circuit in this case. This action is simply not worthy of certiorari.

In addition to the lack of conflict with any decision of the United States Supreme Court, Petitioner's argument contains factual and logical difficulties which make his purported constitutional claims murky at best.

Petitioner notified the Respondent, Illinois Employers Insurance of Wausau, that it owed him $73,750.00 because of certain default judgments obtained in supplemental proceedings brought in Ohio after the entry of default judgments against the Respondent's insured and in favor of Petitioner.

Respondent filed a federal statutory interpleader action in the district court on May 18, 1983. Petitioner is a party defendant as a result of his having filed an action for damages for personal injuries and property damage against the Respondent's insured in the Court of Common Pleas, Lorain County, Elyria, Ohio.

Illinois Employers moved in the district court, for the court to enjoin Mihalcik from attempting to collect on the default judgments against the Respondent, pursuant to 28 U.S.C. §2361. The District Judge had the power pursuant to §2361 to enjoin proceedings "affecting the property, instrument or obligation involved in the interpleader action." 28 U.S.C. §2361; *Travelers Indemnity Co. v. Greyhound Lines, Inc.*, 260 F.Supp. 530, 535 (W.D. La. 1966), *aff'd per curiam*, 377 F.2d 325, 328 (5th Cir. 1967), *cert. denied*, 389 U.S. 832 (1968); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 533-534 (1967).

An interpleader action is designed to protect a stakeholder, as such, from the possibility of multiple claims upon a single fund. *Maryland Casualty Co. v. Glassell-Taylor & Robinson*, 156 F.2d 519 (5th Cir. 1964). To this end the interpleader statutes and rules are "liberally construed to protect the stakeholder from the expense of defending twice, as well as to protect him from double liability." *New York Life Insurance Co. v. Welch*, 297 F.2d 787, 790 (D.C. Cir. 1961). A stakeholder's right to interplead is not necessarily defeated by the fact that an interpleader claimant has an outstanding judgment against the

stakeholder. 3A *Moore's Federal Practice* 22.08[1] n.4 (1984); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939) (interpleader proceeding in which both claimants had previously secured judgments against the stakeholder).

There is no question but that interpleader jurisdiction extends to the *res*, that is, the interpleader fund. *Consolidated Coal v. Bailey*, 467 F.2d 1124 (3d Cir. 1972), *affirming*, 330 F.Supp. 474 (W.D. Pa. 1971); *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425 (10th Cir. 1966), *cert. denied*, 386 U.S. 977, *reh. denied*, 386 U.S. 1043. An injunction is unquestionably proper with respect to proceedings against the fund itself. *Travelers Indemnity Co. v. Greyhound Lines, Inc.*, 377 F.2d 325, 328 (5th Cir. 1967) (per curiam), *cert. denied*, 389 U.S. 832, 88 S.Ct. 101, 19 L.Ed.2d 91 (1968), *affirming*, 260 F.Supp. 530 (W.D. La. 1966).

Petitioner has frankly *admitted*, in his brief to the Seventh Circuit at page 19, that his claim against Respondent "arose out of the policy of liability insurance which is also the subject of the interpleader action." Respondent has no liability whatsoever to Petitioner other than what could or might emanate from the policy of insurance it issued to Rapperswill Corporation, the original defendant in the Ohio proceedings commenced by Petitioner. Petitioner obtained a default money judgment against Respondent's insured. In what can only be regarded as an attempt to collect that judgment, Petitioner filed a Supplemental Complaint in the Ohio proceedings against Respondent and three other insurers of Rapperswill Corporation. In fact, Paragraph 5 of the Supplemental Complaint alleges the following:

> "5. Plaintiffs are entitled to have the insurance money provided for in the above-mentioned contracts of insurance between the new party defendants Illinois Employers Insurance of Wausau, Admiral Insur-

> ance Company, and Ambassador Insurance Company and defendant Rapperswill Corporation applied to satisfaction of the judgments by Plaintiffs against Rapperswill Corporation."

Contrary to the bald unsupported assertions of Petitioner, the enjoinder of Petitioner from attempting to collect his default judgment does not concern itself with any aspect of the application of the doctrine of "full faith and credit" under 28 U.S.C. §1738 or any other provision with respect to a purported valid state court judgment. The default judgments obtained by Petitioner against Respondent total $73,750.00, which figure represents the amount of the fund deposited by Respondent with the district court in its federal statutory interpleader action.

## II.

## EVEN IF AN ISSUE WORTHY OF THE GRANTING OF A WRIT OF CERTIORARI PURSUANT TO THIS COURT'S RULE 17 EXISTED, RESPONDENT IS NOT LIABLE TO PETITIONER AS A MATTER OF LAW.

Petitioner has conceded, in his brief to the Seventh Circuit at page 19, that his claim against Respondent arises out of the insurance policy Respondent issued to the tort defendant in the Ohio proceedings brought by Petitioner. Petitioner's individual judgment is in the amount of $21,071.42. The insurance policy provides as follows:

> "1. The company shall be liable only for the amount of damages payable which is in excess of the retention amount up to the applicable limit of liability stated in the declarations."

The "retention amount" is $50,000.00 for each occurrence. The judgment falls within the self-insured retention of Rapperswill Corporation, hence Respondent has no liability whatsoever. The obligation of Respondent under its policy of insurance, if any, have not been triggered.

## CONCLUSION

The Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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